91-271

No. _____

IN THE

Supreme Court of the United States

October Term, 1991

JOHN MALINOVSKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the midtrial appeal by the state which (a) terminated the trial without a final verdict when the court, *sua sponte,* dismissed the case for failure of prosecution, (b) sought to review a ruling by the court sustaining the petitioner's objection to introduction of hearsay evidence on the grounds that the state has failed to meet its burden of establishing, by independent evidence, existence of a conspiracy between the petitioner and declarant, and (c) was taken over objection of petitioner who sought a final verdict, violate the petitioner's rights under the Double Jeopardy Clause?

2. Has petitioner's constitutional right to Due Process of law been circumvented by the interruption and resulting undue delay associated with the state's midtrial appeal made over petitioner's objection?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

Statutes:

Rules:

No. _____

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OPINIONS BELOW

The Opinion and Judgment of the Supreme Court of Ohio appears in the Appendix, as do the Decision and Journal Entry of the Court of Appeals Ninth Judicial District, Ohio and the Journal Entry of the Court of Common Pleas, Lorain County, Ohio.

JURISDICTION

The Judgment of the Supreme Court of Ohio was entered on May 15, 1991. The Petitioner did not seek rehearing. This Petition for Writ of Certiorari has been filed within ninety days of the May 15, 1991 Judgment. This Court has jurisdiction to grant this Petition under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues in this case arise under the Double Jeopardy Clause, Fifth Amendment of the United States Constitution: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb" and under the Due Process Clause, Fifth and Fourteenth Amendments, of the United States Constitution: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, John Malinovsky, was indicted March 9, 1989 for extortion, perjury, obstructing official business, and interfering with civil rights. Petitioner is the Lorain City Police Chief. The charges arose from what the state alleged was an attempt by petitioner and one of his police officers, Sgt. Wayne Long, to intimidate fire inspectors into overlooking fire code violations at a bingo hall to be operated by the Society for the Prevention of Cruelty to Animals ("SPCA"). Petitioner's daughter was the president of the volunteer-run SPCA.

Because the state's case was based on hearsay evidence, the state tried to secure a ruling on the admissibility of the hearsay prior to trial by filing a "Notice of Intention to Use Evidence" on May 12, 1989. The state hoped to elicit a Motion to Suppress Evidence pursuant to Ohio Criminal Rule 12(B)(3) from the defense. Ohio Criminal Rule 12(B)(3) provides that the ground for this pretrial motion is that the evidence was illegally obtained (App. at A27). However, the hearsay evidence the state intended to use was not illegally obtained and was not appropriately addressed by a Motion to Suppress. The defense did not file any pretrial motions concerning the use of this evidence.

The state further attempted to secure a pretrial ruling on the admissibility of this hearsay, a telephone conversation recording, prior to trial by filing a "Motion to Compel Defense to File Objections" on May 30, 1989. This motion was overruled.

A jury was impaneled and sworn, and the case proceeded to trial June 6, 1989. The state then attempted to introduce the hearsay evidence set forth in the recorded telephone conversation by asking a fire

inspector to testify about what Sgt. Long said that petitioner had said. The defense objected and the state argued that the statement was not hearsay because it was a statement made by a co-conspirator pursuant to Ohio Evidence Rule 801(D)(2)(e). Ohio Evidence Rule 801(D)(2)(w) parallels the federal Evidence Rule 801(D)(2)(e), providing that, upon independent proof of a conspiracy, a statement made by a co-conspirator in the course and furtherance of the conspiracy is not hearsay (App. at A32). The state did not attempt to introduce the recording by calling Sgt. Long.

The trial court sustained the defense's objection finding that the state had not produced sufficient independent evidence of a conspiracy to support introduction of the hearsay. The court indicated that it would reconsider introduction of the recorded telephone conversation if the state could prove its conspiracy allegations with independent evidence. The state chose to file a midtrial notice of appeal on the ruling pursuant to Ohio Criminal Rule 12(J), asserting that this evidentiary ruling destroyed its case. Ohio Criminal Rule 12(J) provides that a prosecutor may appeal from the granting of a motion to suppress evidence or a motion to return seized property (App. at A25). Both of these motions are pretrial motions.

After filing its appeal, the state called one additional witness. The prosecutor then refused to go forward with his case and refused to rest. The petitioner moved for acquittal pursuant to Ohio Criminal Rule 29. The court dismissed the action for want of prosecution and released the jury (App. at A24).

Ohio Revised Code 2945.67(A) provides in pertinent part that, in a criminal case, the state may appeal a trial court's decision which "grants a motion to dismiss all or

any part of an indictment . . ., a motion to suppress evidence, or a motion for the return of seized property . . ." Any other appeal may only be taken with leave of court (App. at A26). In the instant case, the state did not appeal from any of the motions outlined in Ohio Revised Code 2945.67. Rather, it appealed an adverse evidentiary ruling. Nor did the state request a leave to appeal from the Court of Appeals prior to filing its notice of appeal.

The state Court of Appeals affirmed the trial court's dismissal, finding that the state did not take a proper appeal on the interlocutory ruling and that the appeal violated the Double Jeopardy Clause of the Fifth Amendment (App. at A15). The Ohio Supreme Court reversed, holding that the state could appeal a midtrial evidentiary ruling pursuant to Ohio Criminal Rule 12(J) and Ohio Revised Code 2945.67. The Ohio Supreme Court also held that the interlocutory appeal did not violate the Double Jeopardy Clause. The Ohio Supreme Court then remanded the case to the Court of Appeals on May 15, 1991 to determine the correctness of the evidentiary ruling (App. at A1).

The petitioner now requests the Supreme Court of the United States to review the decision of the Ohio Supreme Court and to reverse on the grounds that it violated the Double Jeopardy Clause and the Due Process Clause of the Fifth and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

First Question Presented:

The state filed a midtrial appeal from the trial court's evidentiary ruling which excluded hearsay evidence. The trial court ruled that the state had not established, by independent evidence, a conspiracy and, therefore, the statements were not admissible under Ohio Evidence Rule 801(D)(2)(e). The trial court's ruling was not final, the court stated it would reconsider admission of the hearsay if the state offered additional independent evidence of conspiracy. The state, however, refused to proceed with the trial after filing its notice of appeal. The state deemed this evidence critical to its case in the certification attached to its notice of appeal.

The Supreme Court of Ohio held that the state had authority to bring the appeal pursuant to Ohio Criminal Rule 12(J) and Ohio Revised Code §2945.67. The Supreme Court of Ohio further held that the appeal did not violate the Double Jeopardy Clause and remanded the case to the Court of Appeals to determine the merits of the appeal. The petitioner now seeks review by the United States Supreme Court to determine whether further proceedings following termination of the trial are barred by the Double Jeopardy Clause.

Jeopardy attached prior to the state's midtrial appeal and dismissal as the jury had been impaneled and sworn and the state had introduced evidence. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Crist v. Bretz*, 437 U.S. 28 (1978). After filing its notice of appeal, the state abandoned the trial, refusing the trial court's order to proceed with evidence or rest. The trial court overruled petitioner's motion for acquittal pursuant to Ohio Criminal Rule 29 and, *sua sponte*, dismissed the indictment for failure of prosecution. The petitioner was released from bail and the jury dismissed.

The trial court dismissed the indictment on its own motion. It stated it was dismissing for failure of prosecution and did not characterize the dismissal as either a mistrial or an acquittal. But the trial court's characterization of the dismissal is not controlling. Instead, the Court must inquire whether "the ruling in defendant's favor was actually an acquittal even though the District Court characterized it otherwise." *United States v. Wilson*, 420 U.S. 332, 336 (1975).

The trial court ruled that the state had failed to establish, by independent evidence, that the petitioner and Sgt. Wayne Long were co-conspirators and, therefore, Long's extra-judicial statements were not admissible as admissions pursuant to Ohio Evidence Rule 801(D)(2)(e). The prosecution presented testimony from eight witnesses over two days of trial in an unsuccessful attempt to meet its burden. In its notice of appeal the state certified that this evidentiary ruling destroyed its case.

Both the trial court's evidentiary ruling and the dismissal were a "legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *Serfass v. United States*, 420 U.S. 377, 393 (1975). The dismissal must be considered an acquittal because "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571. The state sought to appeal an evidentiary ruling founded on facts introduced at trial. The trial was terminated as a result of a factual determination after substantial proof. It was not a "bare dismissal of the charge, or by mistrial." The dismissal was in substance, an acquittal barring further prosecution. *United States v. Fay*, 553 F.2d 1247, 1249-1250 (10th Cir. 1977).

Although the Court has recognized that the Double Jeopardy Clause attaches particular significance to a judgment of acquittal, the law also guards the "separate but related interest of a defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." *United States v. Scott*, 437 U.S. 82, 91-92 (1978).

In considering double jeopardy, the Court has differentiated termination of proceedings before judgment by declaration of a mistrial from dismissal of an indictment. A mistrial ruling generally anticipates reprosecution. *United States v. Jorn*, 400 U.S. 470, 476 (1971). Herein, the trial court advised the prosecutor that dismissal would likely bar further proceedings on the grounds of double jeopardy. Thus, the court did not contemplate a second prosecution when it dismissed the case and the dismissal must be deemed an acquittal. *Martin Linen Supply Co.*, 430 U.S. 564; *Wang v. Withworth*, 811 F.2d 952, 957 (6th Cir. 1987) (court's determination construed as a *de facto* acquittal).

Even if the dismissal is not deemed an acquittal, retrial is barred by the Double Jeopardy Clause. In contrast to *Lee v. United States*, 432 U.S. 23 (1977) (defective indictment) and *Scott*, 437 U.S. 82 (preindictment delay), the court did not dismiss the case because of a defect in procedure and, unlike those cases, the dismissal was not at the petitioner's request. The court dismissed the indictment, *sua sponte*, because the prosecutor refused to proceed with its case. The court stated that the actions of the prosecution forced it to dismiss for want of prosecution. The petitioner, by moving for acquittal, sought to have his case resolved by a final verdict of acquittal.

Two principles underlie the Double Jeopardy Clause: the integrity of a final judgment and the avoidance of multiple prosecutions even when guilt or innocence has

not been established. *Scott*, 437 U.S. at 87. The Double Jeopardy Clause prohibits the state from making repeated attempts to convict the accused:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhance the possibility that even though innocent he may be found guilty. *Green v. United States*, 355 U.S. 184, 187-188 (1957).

It has also been recognized that this second "venerable principle" of the Clause is necessary to protect the interest of the accused in retaining a chosen jury. *Crist*, 437 U.S. at 36. The Court further described this interest in *Wade v. Hunter*, 336 U.S. 684, 689 (1949), as a defendant's "valued right to have a trial completed by a particular tribunal." Petitioner John Malinovsky lost his chosen jury when the trial court dismissed the indictment and discharged the jury as a result of the state's refusal to proceed.

The Double Jeopardy Clause does not bar retrial in all cases when the trial terminates after jeopardy attaches. The successful appeal of a judgment of conviction does not bar retrial except on grounds of insufficient evidence. *Ball v. United States*, 140 U.S. 118 (1891); *Burks v. United States*, 437 U.S. 1 (1978). The petitioner was not convicted and did not bring the appeal. A government appeal that presents no threat of successive prosecution on retrial does not violate the clause. *Wilson*, 420 U.S. 332. Here, Malinovsky faces a new trial if the state prevails, which is barred by the Double Jeopardy Clause.

Retrial is not barred following the trial court's declaration of a mistrial without the defendant's consent when there is a "manifest necessity" to protect the ends of public justice. *United States v. Perez*, 9 Wheat. 579 (1824). The declaration of a mistrial, as opposed to a dismissal, "explicitly contemplates reprosecution of the defendant." *Jorn*, 400 U.S. at 476. In this case, the court dismissed for want of prosecution and did not declare a mistrial after full consideration of the double jeopardy consequences. Unlike a mistrial, the granting of a motion to dismiss contemplates that the proceedings will terminate then and there in favor of the defendant. After dismissal, the prosecution must seek review of the trial court's ruling to reinstate the prosecution. *Scott*, 437 U.S. at 94. The court's ruling in this case was clearly a dismissal and not a declaration of mistrial. Here the state did not appeal the dismissal; it appealed an interlocutory evidentiary ruling.

The reason for the dismissal, as announced by the court, was the state's refusal to proceed with the trial. The "Double Jeopardy Clause does protect a defendant against governmental action intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *United States v. Dinitz*, 424 U.S. 600, 611 (1976). Here, the state terminated the trial because it was unable to introduce critical evidence and it terminated the trial with the implicit intent of bringing a second prosecution. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceeding." *Burks*, 437 U.S. at 11. The Court of Appeals below held that further proceedings were barred because termination of the trial resulted from misconduct by the prosecution in not proceeding with the case. Thus, even if the dismissal is deemed a mistrial, it was occasioned by the misconduct of the state, not "manifest necessity". *Perez*, 9 Wheat. 579.

The Double Jeopardy Clause does not prohibit the state from appealing the trial court's granting of a *defendant's* motion to dismiss, made after jeopardy attaches, when it is unrelated to factual guilt or innocence. *Scott*, 437 U.S. 82. In *Scott*, the defendant moved the court to dismiss on the grounds of prejudicial preindictment delay. The trial court granted the motion and dismissed the indictment after hearing evidence. The Supreme Court held that the Double Jeopardy Clause did not bar the government's appeal. The Court concluded that "when the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so is not barred by 18 U.S.C. §3731 (1976 ed.)." 437 U.S. at 101.

The Federal Appeals Act, 18 U.S.C. §3731, permits the government to appeal rulings of a court when not in conflict with the Double Jeopardy Clause. The equivalent statute and criminal rule in Ohio law authorizing appeals by the state, R.C. §2945.67 and Criminal Rule 12(J), do not include such an explicit limitation.

The Supreme Court of Ohio relied on *United States v. Scott*, in holding that the Double Jeopardy Clause did not bar reprosecution of Malinovsky. However, the cases are fundamentally distinct as Malinovsky did not move to have his case dismissed but sought a verdict of acquittal on the evidence presented. As a result of the appeal, the state retained "primary control of the course to be followed". *Dinitz*, 424 U.S. at 609. The state, not the petitioner, chose to avoid a final verdict. The Double Jeopardy Clause prohibits the prosecution from terminating the trial to avoid the petitioner's acquittal and final verdict by filing a midtrial appeal from the trial court's evidentiary ruling.

The Supreme Court in *Scott* emphasized that this exception to the double jeopardy bar contemplates a significant level of participation by the defendant in terminating a trial prior to a determination on its merits. *United States v. Dahlstrum*, 655 F.2d 971, 975 (9th Cir. 1981). The Court described this defense participation in several ways: the defendant "elected to seek termination", "made a voluntary choice", "successfully avoided [a decision on the merits] . . . by persuading the trial court to dismiss", "undertook to persuade the trial not to submit the issue of guilt or innocence to the jury", "obtain[ed] the termination", and "[sought] to have the trial terminated". *Dahlstrum*, 655 F.2d at 975.

In contrast, petitioner Malinovsky merely objected to the introduction of hearsay testimony. He sought a final verdict by submission of the case to the jury on properly admitted evidence. The Supreme Court of Ohio held that the petitioner's objection to the evidence invoked the double jeopardy exception of *Scott*:

> Because the Crim.R. 12(J) appeal and subsequent dismissal for failure to prosecute *were precipitated by the defendant's objection*, in light of *Scott* and *Calhoun*, we hold that the Double Jeopardy Clause does not bar reprosecution when a criminal prosecution is dismissed for failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim.R. 12(J) appeal. (emphasis added). *State v. Malinovsky*, 60 Ohio St. 3d 20, 24 (1991).

The decision of the Ohio Supreme Court stands for nothing less than the proposition that the state may terminate a trial by filing a midtrial appeal, when the court has made an evidentiary ruling that is contrary to the state's position if the ruling is "precipitated" by the

defendant's objection. An evidentiary objection does not seek to terminate the prosecution without a determination of guilt or innocence. The petitioner, who sought exclusion of hearsay evidence by timely objection based on a rule of evidence, sought a final judgment of acquittal. The Double Jeopardy Clause does not permit the prosecution to try a defendant again simply in order to get better facts before the jury. *Saylor v. Cornelius,* 845 F.2d 1401, 1407-1408 (6th Cir. 1988).

The Ohio Supreme Court is the final authority interpreting Ohio law. Its decision permitting a midtrial appeal under Ohio Criminal Rule 12(J) is unassailable as a matter of statutory construction. However, notwithstanding the Ohio Supreme Court's decision recognizing the state's authority to appeal, the termination of the trial in this case violated the petitioner's right against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. *Benton v. Maryland,* 395 U.S. 784 (1969).

Thus, petitioner respectfully requests that this Court accept his Petition for Writ of Certiorari.

Second Question Presented:

Ohio Criminal Rule 12(J) does not authorize midtrial appeals on its face. This was the first time the state used Ohio Criminal Rule 12(J) to take a midtrial appeal. Traditionally, evidentiary rulings have been considered interlocutory and within the sole province of the trial court, subject to appellate review only upon final disposition of the case. The Ohio Supreme Court's decision has radically altered the balance existing between the rights of an accused and the rights of the state. *State v. Malinovsky,* 60 Ohio St. 3d at 25, J. Resnick dissenting. Accordingly, the petitioner had no prior notice that the state could arbitrarily interrupt his trial in this manner nor could he anticipate that the Ohio Supreme Court would erroneously allow such an appeal. The touchstone of due process is the protection of the individual against arbitrary action of the government. *Wolff v. McDonnell,* 418 U.S. 539 (1974). Petitioner was arbitrarily denied a fair trial as the state circumvented due process of the law by its actions.

Inherent in any midtrial appeal from an evidentiary ruling is trial delay while the appeal is pending. Petitioner's trial has been delayed more than two years while the state pursued its appeal. The essence of due process is fundamental fairness. *Lisenba v. California,* 314 U.S. 219 (1941). To allow the trial to resume at this time would be fundamentally unfair and prejudicial to petitioner. Should the Ohio Court of Appeals determine that the evidentiary ruling was erroneous and remand to the trial court, the state may subsequently appeal midtrial from another evidentiary ruling if it "destroys" the state's case, resulting in further delays in petitioner's trial. Even if the trial does not resume, petitioner has been denied due process by the state's unforeseen use of a midtrial appeal from a mere evidentiary ruling.

A criminal defendant is entitled to a speedy resolution of charges against him. *DiBella v. United States,* 369 U.S. 121, 126 (1962). While the delay which the Speedy Trial Clause of the Sixth Amendment addresses is primarily pre-indictment or pretrial delays, the test set forth in *Barker v. Wingo,* 407 U.S. 514, 530 (1972) applies equally to the danger of such delays at trial.

First, the test examines the length of the delay; in the case *sub judice,* the trial has been delayed more than two years. Second, the test looks to the reason for the delay; here, the delay was caused by the state's unconstitutional midtrial appeal. Third, the test factors in the defendant's assertion of his right; in the instant case, petitioner objected to the state's improper appeal because he was prepared to proceed with evidence and he was entitled to have his case heard by his chosen jury. *Crist v. Bretz,* 437 U.S. 28. Finally, the test weighs the prejudice to the defendant caused by the delay; here, not only has the petitioner been prejudiced by the dismissal of the jury but also by witness' memories dimming and the state's opportunity to obtain a second "bite of the apple" prohibited by the double jeopardy clause. *Burks,* 437 U.S. at 16.

It is clear that the same dangers inherent in pretrial delays are present in midtrial delays as addressed by the Due Process Clause. Justice Harlan correctly concluded in his concurrence in *Klopfer v. North Carolina* that this type of procedure "which in effect allows state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." 386 U.S. 213, 227 (1967) (indefinite

postponement of prosecution over defendant's objection and without justification denied petitioner the right to a speedy trial). Additionally, the *Klopfer* court stated that "the pendency of indictment may subject [the defendant] to public scorn and deprive him of employment . . ." *Id.* at 222.

Here, as in *Klopfer*, petitioner is still subject to reprosecution because of the Ohio Supreme Court's decision and has remained under a cloud of unliquidated criminal charges for more than two years. The appeals have placed the petitioner under an increased financial burden. The resulting delay has created emotional strain and insecurity. The delay has injured petitioner's ability to present his defense; witness memories have weakened and the state has had additional time to prepare its case. The risk of conviction has increased, although petitioner is not guilty of the charges. The appeal eliminated petitioner's interest in having the case presented to the jury selected at trial. It has exposed him to unwarranted public criticism and has made it more difficult for him to serve effectively as police chief for the City of Lorain, Ohio. *See Green,* 355 U.S. 184.

These charges would have been resolved at trial with a verdict but for the state's midtrial appeal. Instead, the petitioner has been subjected to public scorn for more than two years. The state's actions violate all notions of fundamental fairness under the Due Process Clause.

Therefore, petitioner respectfully requests this Court to accept his Petition for Writ of Certiorari.

CONCLUSION

The Court should grant this Petition for Writ of Certiorari and hold that any proceedings after termination of the trial violated double jeopardy. The Court should find that the state may not, consistent with the Double Jeopardy Clause, terminate a trial after jeopardy attaches but prior to verdict by appealing the trial court's ruling excluding hearsay evidence. The Court should hold that the action of the state deprived the petitioner of his right to have his case submitted to his chosen jury and his right to be free from multiple prosecutions.

The Court should also grant the Petition for Writ of Certiorari and hold that the midtrial appeal violated the petitioner's right to due process by interrupting his trial and subjecting him to unwarranted delay in resolving pending criminal charges.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided May 15, 1991)

No. 90-317

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellant,

v.

JOHN MALINOVSKY,
Appellee.

[Cite as State *v.* Malinovsky (1991), 60 Ohio St. 3d 20.]

Criminal Law—Crim. R. 12(J) allows for expedited appeals from evidentiary rulings during trial—Double jeopardy does not bar reprosecution of accused, when.

O.Jur. 3d Criminal Law §§846, 1433.

1. Because of the procedural safeguards provided by certification, Crim. R. 12(J) allows for expedited appeals from evidentiary rulings during trial without impermissibly infringing upon a defendant's interest in an uninterrupted trial.

2. The Double Jeopardy Clause does not bar reprosecution where a criminal prosecution is dismissed for failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim. R. 12(J) appeal.

(No. 90-317—Submitted February 5, 1991—
Decided May 15, 1991.)

APPEAL from the Court of Appeals for
Lorain County, No. 89CA004592.

[21] On March 9, 1989, the Grand Jury of Lorain County returned a four-count indictment against John Malinovsky, the Chief of Police for the city of Lorain. The indictment charged Malinovsky with extortion, perjury, obstructing official business, and interfering with civil rights. The state alleged that Malinovsky ordered a police officer under his command, Sergeant Wayne Long, to intimidate two fire inspectors into overlooking fire code violations at a bingo parlor run by Malinovsky's daughter.

The state's case was based on the testimony of the two fire inspectors. From the outset, the state intended to have the fire inspectors testify as to what Long said to them, which testimony directly implicated Malinovsky. The state also intended to enter into evidence a tape recording of a telephone conversation between Long and Roger A. Thomas, one of the fire inspectors, which implicated Malinovsky in a like manner.

Recognizing potential hearsay problems with this evidence and the critical nature of same to its case, the state attempted to secure a ruling on the admissibility of the evidence through pretrial motions. On May 12, 1989, the state filed a "Notice of Intention to Use Evidence" in an effort to elicit a motion pursuant to Crim. R. 12 from Malinovsky. On May 30, 1989, the state filed a "Motion to Compel Defense to File Objections" concerning the admissibility of the telephone conversation recording. This motion was overruled and

the case proceeded to trial without resolving any questions concerning the admissibility of either the recording or the testimony crucial to the state's case.

At trial, the state's fears were realized. When the state asked Anthony M. Cuevas, the other fire inspector, to recount what Long said that Malinovsky had said, the defense objected and the court sustained the objection. The state argued that the testimony was not hearsay because it was a statement made by a co-conspirator in furtherance of a conspiracy pursuant to Evid. R. 801(D)(2)(e). However, the trial court apparently found that the state had not met its burden under the rule requiring independent proof of the conspiracy.

The court then recessed, during which time the state filed notice that it was taking a Crim. R. 12(J) appeal from this adverse ruling by the trial court. Although failing initially to do so, by the end of the recess the state had certified that this appeal was not taken for the purpose of delay and that the court's evidentiary ruling had destroyed the state's case. The trial court ordered the state to continue with its case, despite the appeal. After a faltering attempt to continue, the state announced that it could not go forward without the excluded testimony. The court then dismissed the case for failure to prosecute.

The Court of Appeals for Lorain County dismissed the appeal, holding that Crim. R. 12(J) does not provide for a mid-trial appeal of an evidentiary ruling. The appellate court also held that the Double Jeopardy Clause barred future prosecution.

The case is now before this court upon the allowance of a motion for leave to appeal.

Gregory A. White, prosecuting attorney, and *Jonathan E. Rosenbaum,* for appellant.

Smith & Smith, Daniel G. Wightman and *Gerald M. Smith,* for appellee.

Michael Miller and *Alan C. Travis,* urging reversal for *amicus curiae,* Ohio Prosecuting Attorneys Association.

WRIGHT, J. The General Assembly has granted prosecutors the right of [22] appeal from an adverse ruling on a motion to suppress evidence prior to final disposition of a criminal prosecution. Crim. R. 12(J) reads:

"*** The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

"Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

"If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification."

Additionally, R.C. 2945.67 provides a similar right to appeal:

"(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter or [of] right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case.

"(B) In any proceeding brought pursuant to division (A) of this section, the court shall, in accordance with Chapter 120 of the Revised Code, appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive his right to counsel."

In *State v. Davidson* (1985), 17 Ohio St. 3d 132, 17 OBR 277, 477 N.E. 2d 1141, at the syllabus, we defined "motion to suppress" as used in Crim. R. 12(J) to include "[a]ny motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed. ***"

Davidson involved a pretrial motion *in limine* seeking to exclude evidence, not due to constitutional infirmity, but rather, under the Rules of Evidence. We

made no comment in *Davidson* as to the applicability of Crim. R. 12(J) to evidentiary rulings at trial. Today, we are asked to decide whether a prosecutor may file a Crim. R. 12(J) appeal during trial.

The defendant argues that a mid-trial evidentiary ruling is not a final appealable order and, hence, not appealable until final disposition of the case. The defendant further argues that because the state cannot appeal during trial, the subsequent dismissal for failure to prosecute coupled with the Double Jeopardy Clause bars reprosecution.

[23] I

The defendant's arguments point directly to the problem that Crim. R. 12(J) was designed to address. A criminal defendant prejudiced by an adverse evidentiary ruling has the absolute right of appeal after conviction, and, if successful, may obtain meaningful relief. Prior to the adoption of Crim. R. 12(J), the state lacked this remedy. If the state was prejudiced by an adverse evidentiary ruling resulting in an acquittal, the state had no meaningful recourse, as the Double Jeopardy Clause barred retrial. In response, the adoption of Crim. R. 12(J) and enactment of R.C. 2945.67 were designed to preclude the loss of a worthy criminal case solely due to an erroneous ruling by a trial court.

While we have not previously considered whether a Crim. R. 12(J) appeal lies mid-trial, the state faces the same prospect of losing cases due to mistaken evidentiary rulings during trial as it does before trial. Once trial has begun, however, the defendant has an important interest in having his or her case decided by the jury impaneled to hear same. This interest arises from a defendant's right to a speedy trial and a

defendant's double jeopardy guarantee to be free from multiple prosecutions. However, this interest is not absolute. See *United States v. Scott* (1978), 437 U.S. 82; *State v. Calhoun* (1985), 18 Ohio St. 3d 373, 18 OBR 429, 481 N.E. 2d 624.

We are thus faced with the question of whether the defendant's interest in an uninterrupted trial outweighs the state's interest in effective prosecutions. Because of the procedural safeguards provided by certification, we hold that Crim. R. 12(J) allows for expedited appeals of evidentiary rulings during trial without impermissibly infringing upon a defendant's interest in an uninterrupted trial.

Crim. R. 12(J) does not provide the state with an unfettered right of appeal. The certification element of Crim. R. 12(J) provides the defendant with protection from prosecutorial abuse and harmonizes the appeal with the final order requirement of the Ohio Constitution.[1] Under Crim. R. 12(J) the state must certify that the appeal is not taken for the purpose of delay and that the complained-of ruling destroys the state's case. Because the state certifies that the ruling destroys its case, the ruling is, in essence, a final order.

II

We next turn to defendant's double jeopardy argument. The appellate court held that the prohibition against double jeopardy attached to the mid-trial dismissal for failure to prosecute. Although the guarantee against double jeopardy generally attaches

[1] Section 3(B)(2), Article IV of the Ohio Constitution reads in part:

"Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district ***[.]"

upon impanelment of the jury, it is not absolute at that point. *Scott, supra; Calhoun, supra.* In *Scott,* the United States Supreme Court held that double jeopardy protection is not absolute until there is a dismissal or acquittal based upon a factual finding of innocence. *Id.* at 96-97. *Scott* ultimately held that retrial is permissible after the guarantee against double jeopardy has attached where the defendant has sought a termination of the proceedings on grounds other than the state's failure of proof. *Id.* at 101. [24] Similarly, in *Calhoun,* we held that retrial was not barred by the Double Jeopardy Clause where a trial court erroneously dismissed an indictment at trial on the grounds that the statute establishing the crime was unconstitutionally vague. *Calhoun, supra,* at syllabus.

Today, we are asked whether double jeopardy bars retrial where a trial court, after ruling on a defendant's objection to evidence crucial to the state's case, erroneously precluded the state from taking a Crim. R. 12(J) appeal and subsequently dismissed criminal charges for a failure to prosecute. Because the Crim. R. 12(J) appeal and subsequent dismissal for failure to prosecute were precipitated by the defendant's objection, in light of *Scott* and *Calhoun,* we hold that the Double Jeopardy Clause does not bar reprosecution where a criminal prosecution is dismissed for failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim. R. 12(J) appeal. See, generally, Annotation (1989), 95 L. Ed. 2d 924; Annotation (1985), 40 A.L.R. 4th 741.

Therefore, the judgment of the court of appeals is reversed and this cause is remanded to that court for consideration of the state's appeal of the evidentiary ruling.

Judgment reversed
and cause remanded.

MOYER, C.J., SWEENEY, HOLMES and DOUGLAS, JJ., concur.

DOUGLAS, J., concurs separately.

H. BROWN and RESNICK, JJ., dissent.

DOUGLAS, J., concurring. I concur in the syllabus, the judgment and the well reasoned opinion of the majority. I write separately only to call attention to our recent decision in *State v. Fraternal Order of Eagles Aerie 0337 Buckeye* (1991), 58 Ohio St. 3d 166, _____ N.E. 2d _____, which is additional authority in support of the propositions of law set forth so clearly and well by Justice Wright in the case at bar.

ALICE ROBIE RESNICK, J., dissenting. The state's ability to appeal as of right was nonexistent until the General Assembly saw fit to enact R.C. 2945.67. Furthermore, Crim. R. 12(J) is an exception to the general rule prohibiting appeals by the state in criminal prosecutions; thus, it must be strictly construed. The sole "purpose of Crim. R. 12(J) is to allow the state a review of the adverse ruling of a trial court on a motion for the return of seized property, *or* on a motion to suppress evidence, where the granting of the motion has so debilitated the vitality of the state's case that any reasonably effective prosecution has been destroyed ***." (Emphasis *sic.*) *State v. Caltrider* (1975), 43 Ohio St. 2d 157, 72 O.O. 2d 88, 331 N.E. 2d 710, at paragraph two of the syllabus. In spite of the clear legislative intent, the majority today has extended by judicial fiat the parameters within which the state may appeal as of right pursuant to R.C. 2945.67 and Crim. R. 12(J).

Reliance on *State v. Davidson* (1985), 17 Ohio St. 3d 132, 17 OBR 277, 477 N.E. 2d 1141, is misplaced. Admittedly, *Davidson* dealt with the state's right of

appeal in situations beyond motions to suppress. However, the basis was the fact that at times a motion is called a motion in limine when in actuality it is a motion to suppress. *Davidson, supra,* simply promotes a reasonable interpretation of R.C. 2945.67 and Crim. R. 12(J) in order to [25] ensure fairness and avoid a miscarriage of justice.

The state is not totally without ability to appeal other matters, excluding the final verdict, since the General Assembly has provided the state with the ability to appeal by leave of court in R. C. 2945.67. However, today's holding appears to clothe the state with even broader rights of appeal than those envisioned by the legislature.

While the state endeavored to force the appellee to file a pretrial motion regarding the conversations at issue, none was filed. Hence the state is attempting to appeal a purely adverse evidentiary ruling. It would appear that the state was trying to establish the conspiracy by means of the disputed evidence itself. The trial court ruled that no foundation for a conspiracy was laid by the prosecution. In fact, the trial court made it clear that it would reconsider its ruling if the state presented some independent evidence of the conspiracy. Thus, it becomes quite clear that this was an interlocutory ruling and cannot under any circumstances be appealed.

Not only is this case distinguishable from *Davidson, supra,* but it is also distinguishable from our recent opinion in *State v. Fraternal Order of Eagles Aerie 0337 Buckeye* (1991), 58 Ohio St. 3d 166, _____ N.E. 2d _____. The defendants in both *Davidson* and *F.O.E. Buckeye* had filed a pretrial motion. In the present case, no pretrial motion of any kind was filed by appellee.

Today's holding will result in allowing the state an appeal as of right from every adverse evidentiary ruling during the course of trial without any pretrial or mid-trial motion being filed. Immeasurable delays in the prosecution of cases will inevitably result. Indeed, today's holding implies that trial courts need someone to review all of their routine evidentiary rulings in order that a fair trial may occur. We have always placed great discretion in the trial court to determine what evidence is and is not admissible during the course of a trial. *State v. Sage* (1987), 31 Ohio St. 3d 173, 31 OBR 375, 510 N.E. 2d 343. A better solution to the problem presented by this case would be to permit the prosecution to file a pretrial motion for an evidentiary ruling. The state would then be in a position to properly prepare and present its case knowing what evidence would and would not be admissible. Additionally, the delays of the appeal process would be avoided. The state, however, still would not be able to appeal any interlocutory rulings which are subject to change during the course of the trial.

After a thorough consideration of R.C. 2945.67 and Crim. R. 12(J), it is beyond comprehension how the state can be afforded an appeal as of right from a purely evidentiary ruling—one which does not involve the seizure of property or an adverse ruling on a motion to suppress evidence. The ruling at issue is totally interlocutory since it could have been changed by the trial court if the prosecution had laid the proper foundation for the existence of a conspiracy.

In conclusion, I also disagree with the majority's holding as to double jeopardy. However, the foregoing enlargement of the state's right of appeal as to evidentiary rulings is so strained that I will not comment further on double jeopardy for fear of giving the slightest hint of credibility to the majority's holding. I would affirm the court of appeals.

H. BROWN, J., concurs in the foregoing dissenting opinion.

MANDATE OF THE SUPREME COURT OF OHIO

(Dated May 15, 1991)

Case No. 90-317

STATE OF OHIO,
Appellant,

v.

JOHN MALINOVSKY,
Appellee.

MANDATE

To the Honorable Court of Appeals

Within and for the County of Lorain, Ohio

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is reversed and the cause is remanded to that court for consideration of the state's appeal of the evidentiary ruling consistent with the opinion rendered herein.

COSTS:

Motion Fee, $40.00, paid by Gregory White.

(Court of Appeals No. 89CA004592)

/s/ THOMAS J. MOYER
Chief Justice

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated May 15, 1991)

Case No. 90-317

STATE OF OHIO,
Appellant,

v.

JOHN MALINOVSKY,
Appellee.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Lorain County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and the cause is remanded to that court for consideration of the state's appeal of the evidentiary ruling consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Appeals for Lorain County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

(Court of Appeals No. 89CA004592)

/s/ THOMAS J. MOYER
Chief Justice

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS, LORAIN COUNTY, OHIO

(Dated December 27, 1989)

C.A. No. 89CA004592

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF LORAIN)

STATE OF OHIO,
Plaintiff-Appellant,

v.

JOHN MALINOVSKY,
Defendant-Appellee.

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF LORAIN, OHIO
CASE NO. 89 CR 037121

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, *J.* The state appeals the trial court's mid-trial dismissal of the state's case for want of prosecution. We affirm.

Defendant-appellee, John Malinovsky, was indicted for extortion (R.C. 2905.11), perjury (R.C. 2921.11), obstructing official business (R.C. 2921.31) and interfering with civil rights (R.C. 2921.45).

After a jury was sworn, the state attempted to introduce statements of an alleged co-conspirator with Malinovsky. Malinovsky timely objected to these statements claiming that the state had failed to independently show a conspiracy to [2] allow the otherwise hearsay statements to be admitted as admissions of a co-conspirator pursuant to Evid. R. 801(D)(2). The trial court sustained Malinovsky's objections. The state then filed a notice of appeal pursuant to Crim. R. 12(J) and R.C. 2945.67(A), and refused to proceed further with the trial. Malinovsky moved for acquittal, which was denied. The trial court thereupon dismissed the charges for want of prosecution.

ASSIGNMENTS OF ERROR

"I. The trial court erred in dismissing this case for lack of prosecution after the state filed a notice of appeal divesting the trial court of jurisdiction and when the defense consciously refused to raise, prior to trial, their objections which resulted in suppression of the evidence necessitating a mid-trial appeal.

II. The trial court, based upon the erroneous belief that the state failed to meet its threshold evidentiary burden to establish a conspiracy by independent evidence, erred when it suppressed the evidence in this case."

The state asserts that the trial court's evidentiary ruling was in effect the granting of a motion to suppress evidence. Therefore, the state claims it may appeal this

ruling as of right pursuant to Crim. R. 12(J) and R.C. 2945.67(A). However, we hold that Crim. R. 12(J) and R.C. 2945.67(A) do not permit an interlocutory appeal of a mid-trial evidentiary ruling and further proceedings are now barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution.

[3] I

Crim. R. 12(J) provides in part:

"(J) *** *The state may take an appeal as of right* from the granting of a motion for the return of seized property, or *from the granting of a motion to suppress evidence* if, in addition to filing a notice of appeal, the prosecuting attorney certified that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed . . ."

"***." (Emphasis added).

R.C. 2945.67(A) likewise provides in part:

"(A) *A prosecuting attorney . . . may appeal as a matter [of] right any decision of a trial court in a criminal case, . . . which decision grants* a motion to dismiss all or any part of an indictment, complaint, or information, *a motion to suppress evidence,* or a motion for the return of seized property or grants post conviction relief pursuant to section 2953.21 to 2953.24 of the Revised Code, and *may appeal by leave of the court* to which the appeal is taken *any other decision, except the final verdict,* of the trial court in a criminal case . . ."

"***." (Emphasis added).

Crim. R. 12(B)(3) provides:

"***.

> "(3) *Motions to suppress evidence,* including but not limited to statements and identification testimony, *on the ground that it was illegally obtained.* Such motions shall be filed in the trial court only;" (Emphasis added).

The state contends that the trial court's ruling excluding as hearsay the statements made by an alleged co-conspirator is in effect the granting of a motion to suppress these statements. Therefore, the state argues the [4] trial court's ruling is a final order and appealable pursuant to R.C. 2945.67(A) and Crim. R. 12(J). The state relies upon *State v. Davidson* (1985), 17 Ohio St. 3d 132, in support of this contention.

In *Davidson*, the trial court sustained a pre-trial motion *in limine* designed to suppress evidence based upon a constitutional ground. *Id.* at 134, fn. 2. The Supreme Court ruled that the trial court's granting of the motion *in limine* was in effect the granting of a motion to suppress, and, therefore, was a final order and appealable. *Id.* at 135. The Supreme Court held that:

> "Any motion however labeled, which, if granted, *restricts the state in the presentation of certain evidence* and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such a motion is a final order and may be appealed pursuant to R.C. 2945.67 and Crim. R. 12(J)." (Emphasis added.)

Id., syllabus.

Although *Davidson* allows the state, under certain circumstances, to appeal as of right from a pre-trial suppression of evidence, such is not the case when the trial court makes a mid-trial evidentiary ruling.

In the case *sub judice,* Malinovsky objected that the state had failed to make a *prima facie* showing of a conspiracy so as to allow introduction of otherwise hearsay statements into evidence as admissions of a co-conspirator pursuant to Evid. R. 801(D)(2)(e). The trial court agreed [5] that the state had failed to lay a proper foundation to admit the statements over the hearsay rule and sustained the objection. There was no claim that the statements were suppressible because they were illegally obtained. The trial court's ruling was not a suppression of the evidence. It was instead an ordinary evidentiary ruling which would not be reviewable until after judgment. Crim. R. 12(J) and R.C. 2945.67(A) do not authorize the state to take an interlocutory appeal to test the court's ruling.

We hold that the state's interlocutory appeal as of right was not proper and thus the state had no right to refuse to proceed with the trial. The trial court did not abuse its discretion by dismissing the case for lack of prosecution.

II

We must also determine whether further criminal proceedings against Malinovsky are barred by the Double Jeopardy Clause.

It is clear that the state may not put a defendant twice in jeopardy for the same offense. *Benton v. Maryland* (1969), 395 U.S. 784, 794; *State v. Johnson* (1983), 6 Ohio St. 3d 420, 421. Jeopardy attaches when the jury is impanelled and sworn. *Crist v. Bretz* (1978), 437 U.S. 28, 29; *State v. Calhoun* (1985), 18 Ohio St. 3d 373, 375. The underlying idea of the prohibition against double jeopardy is that the state, with all its resources and power, should not be allowed to make

repeated attempts to convict [6] an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty. *Green v. United States* (1957), 355 U.S. 184, 187-88; *United States v. Scott* (1978), 437 U.S. 82, 87. The guarantee against double jeopardy protects against a second prosecution for the same offense following an acquittal, a second prosecution following a conviction and multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 717; *Johnson, supra.*

The law attaches particular significance to an acquittal. *Scott, supra,* at 91. An acquittal is an absolute bar to retrial even if the acquittal is based upon an egregiously erroneous foundation. *Sanabria v. United States* (1978), 437 U.S. 54, 64, quoting *Fong Foo v. United States* (1962), 369 U.S. 141, 143.

In the case *sub judice,* the trial court specifically rejected Malinovsky's motion for acquittal prior to dismissing the case for want of prosecution. Therefore, we must look further into the doctrine to determine if double jeopardy bars retrial of Malinovsky.

Double jeopardy is sometimes, but not always, a bar to retrial in trial terminations other than acquittals. Whether a defendant may be retried following a mistrial depends on the circumstances of each mistrial. When the defendant successfully moves for a mistrial, he may not thereafter [7] invoke the bar of double jeopardy, unless the prosecution's conduct was intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy* (1982), 456 U.S. 667, 679. Upon the granting of a mistrial over the objection of the defendant, the state may bring

a second prosecution when the mistrial has been occasioned by a "manifest necessity." *United States v. Perez* (1824), 22 U.S. (9 Wheat.) 579, 580; *State v. Glover* (1988), 35 Ohio St. 3d 18, 19. *State v. Widner* (1981), 68 Ohio St. 2d 188, 189. However, the prosecution has the burden to prove a "manifest necessity" for the mistrial. *Arizona v. Washington* (1978), 434 U.S. 497, 505. When the trial court *sua sponte* declares a mistrial, double jeopardy does not bar retrial unless the judge's action was instigated by prosecutorial misconduct designed to provoke a mistrial, or the declaration of a mistrial constituted an abuse of discretion. *Glover, supra*, at 21; *Widner, supra* at 191-192, see, *Kennedy, supra.*

In the case *sub judice*, the trial judge dismissed the case *sua sponte* for lack of prosecution. However, the trial judge's characterization of his own action cannot control the classification of the action. *Scott, supra*, at 96; *United States v. Jorn* (1971), 400 U.S. 470, 478 fn. 7.

The trial court's dismissal of the case upon the state's refusal to proceed was closely akin to the *sua sponte* declaration of a mistrial. Therefore, in order to determine whether the state may retry Malinovsky, we must determine if the mistrial was caused by prosecutorial misconduct designed [8] to provoke a mistrial, or if the trial court abused its discretion in declaring a mistrial. See *Glover, supra, Widner, supra.*

As part of the protections against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a valued right to have his trial completed by a particular tribunal. *Wade v. Hunter* (1949), 336 U.S. 684, 689. However, this right is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. *Washington, supra.*

In the case *sub judice,* retrial of Malinovsky is barred because the state's action in refusing to proceed was designed to provoke the mistrial.

The state asserts that the trial court was divested of jurisdiction to proceed with trial following the state's filing of a notice of appeal of the evidentiary ruling. However, the state had no right to take an interlocutory appeal on such an evidentiary issue. The state's unauthorized notice of appeal and subsequent refusal to proceed caused the trial to terminate prior to verdict. Unlike *Scott, supra,* the termination of the trial before verdict was due to a legal error by the state, and not the result of the misconduct, error, or request of Malinovsky. The effect of a new trial would allow the state another opportunity to convict Malinovsky. The premature termination of the trial was the result of prosecutorial misconduct [9] and, therefore, retrial of Malinovsky is barred by the Double Jeopardy Clause.

The assignments of error are overruled and the appeal is dismissed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ DANIEL B. QUILLIN
FOR THE COURT

CACIOPPO, *P. J.*
concurs

BAIRD, *J.*
concurs in judgment only

[10] APPEARANCES:

GREGORY A. WHITE, *Prosecuting Attorney,* 226 Middle Ave., Elyria, OH 44035 *for Plaintiff.*

GERALD M. SMITH, *Attorney at Law,* 110 Moore Rd., Avon Lake, OH 44012 *for Defendant.*

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated June 8, 1989)

Case No. 89CR037121

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

STATE OF OHIO,
Plaintiff,

vs.

JOHN MALINOVSKY,
Defendant.

Date 6/8/89

Case dismissed for want of prosecution. Defendant discharged; bond released.

/s/ TERENCE O'DONNELL

R.C. 2945.67

§2945.67 [Appeal by state.]

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter or [of] right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2053.21 to 2053.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case.

(B) In any proceeding brought pursuant to division (A) of this section, the court shall, in accordance with Chapter 120, of the Revised Code, appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive his right to counsel.

HISTORY: 137 v H 1168. Eff. 11-1-75.

Analogous to former R.C. §2945.67 CC §13446-1; 113 v 123; Bureau of Code Revision, 10-1-33; 131 v 652; 137 v H 2191, repealed 137 v H 1168, §2 eff 11-1-78.

Analogous to former CC §13681.

RULE 12. Pleadings and Motions Before Trial: Defenses and Objections

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only;

(4) Requests for discovery under Rule 16;

(5) Requests for severance of charges or defendants under Rule 14.

CRIM. R. 12(J)

(J) State's right of appeal upon granting of motion to return property or motion to suppress evidence. The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

OHIO CONSTITUTION

Section 3(B)(2), Article IV

§3 Court of appeals.

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and deposition on each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

RULES OF APPELLATE PROCEDURE

APP. R. 4(B)

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from: provided that in appeals under Criminal Rule 12(J) and Juvenile Rule 22(F) the notice of appeal shall be filed with the clerk of the trial court within seven days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

APP. R. 3(A)

TITLE II: APPEALS FROM JUDGMENT AND ORDERS OF COURT OF RECORD

RULE 3. Appeal as of right—how taken

(A) Filing the notice of appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or consolidated appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part therof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(D) Service of the notice of appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries, together with a copy of all filings by appellant pursuant to Rule 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

(E) Amendment of the notice of appeal. The court of appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal.

(Amended, eff 7-1-72; 7-1-77)

RULES OF EVIDENCE

Article VIII

HEARSAY

Evid R 801

Definitions

The following definitions apply under this article:

(A) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(B) Declarant.

A "declarant" is a person who makes a statement.

(C) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D(Statements which are not hearsay.

A statement is not hearsay if:

(1) Prior statement by witness. The declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with his testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with his

testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent. The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity, or (b) a statement of which he has manifested his adoption or belief in its truth, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.